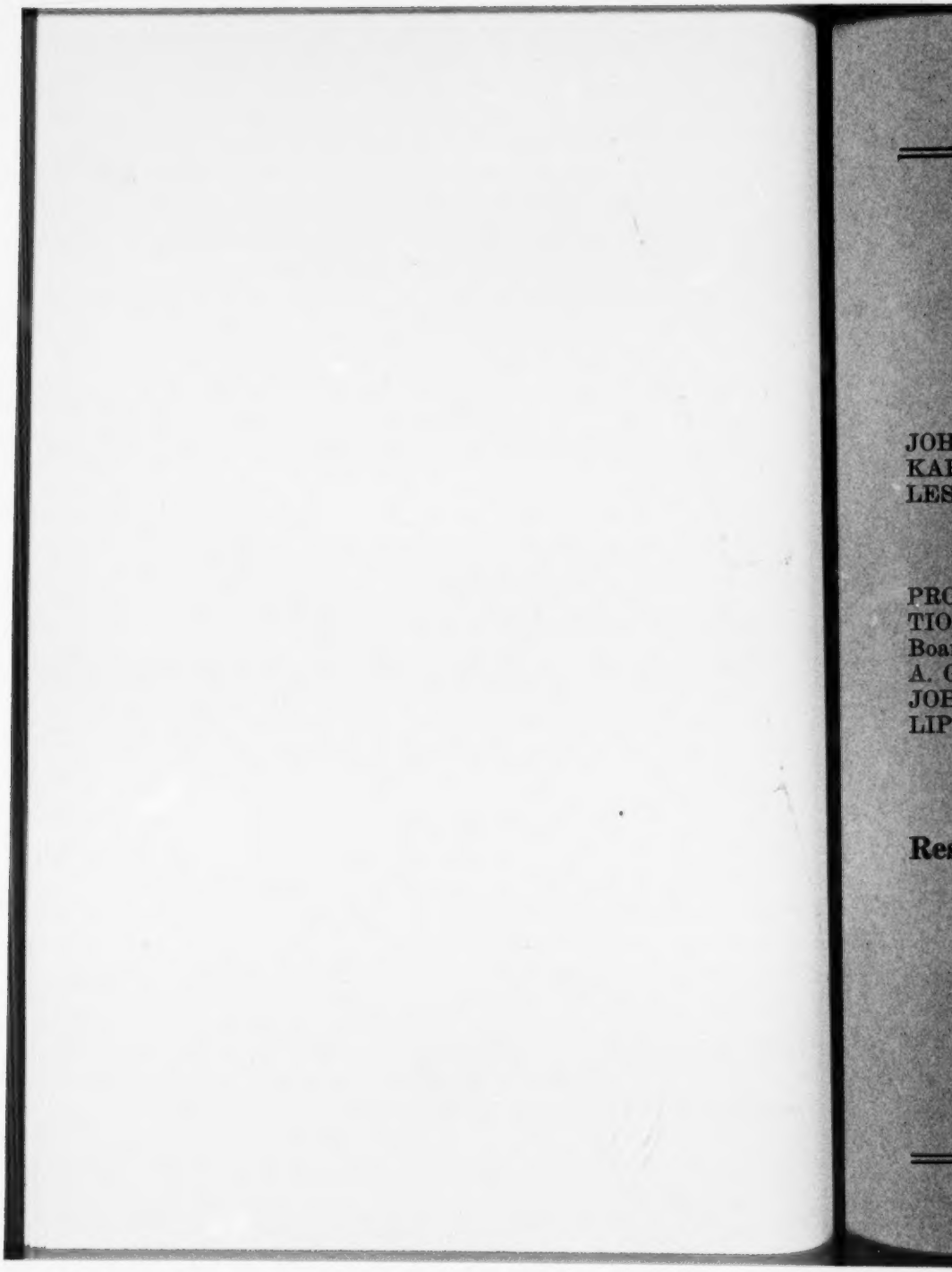

No. 825

APR 5 1941

CHARLES ELMORE CROPLEY
CLERK

The Supreme Court of the United States

OCTOBER TERM, 1941

JOHN FOWER, W. J. CORDNER, M. E. KARTCHNER, JR. and RAY E. LOVELESS,
Petitioners and Plaintiffs Below,

— vs —

PROVO BENCH CANAL AND IRRIGATION COMPANY, a corporation, and its Board of Trustees, RAY V. WENTZ, A. G. KEETCH, LEONARD WALKER, JOHN STRATTON, EMERY McKELLIP, NIELS ANDERSON and A. LOWE,
Respondents and Defendants Below.

Respondents' Brief in Opposition to Granting Writ of Certiorari

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Counsel for Respondents.

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Respondents' Brief in Opposition to Granting Writ of Certiorari

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your respondents respectfully show:

STATEMENT OF CASE

In the main, respondents are in accord with petitioners' statement of the case. However, a summary of the facts believed by us to be pertinent and an elimination of

extraneous matter may present a clearer picture of the fact situation involved.

The respondents will be hereinafter referred to as the company, since the individual respondents are merely trustees of the defendant canal and irrigation company.

The company was organized under the laws of the Territory of Utah, February 26, 1887, (R. 39.) The Articles with reference to the powers and objects of the company provided as follows:

> "Second: That the object of said corporation shall be to convey water from Provo River to Provo Bench and lands adjacent thereto and to regulate and control the same for the purpose of irrigation." (R. 3, 40)
>
> "Sixteenth: The capital stock of said corporation consists of a canal known as the Provo Bench Canal, running from Provo river at the mouth of Provo canyon to and on Provo Bench, a distance of three miles, more or less, and is from twelve to sixteen feet wide, and all rights to the use of water flowing therein. And the amount of interest which each party to this agreement owns in said canal and in the rights to the use of said water is represented in the amount placed opposite their respective names in the following list. And the said property having been this day conveyed by valid deeds by the undersigned, is hereby accepted in full payment of eighty per cent, of the amount subscribed by each of the parties hereto." (R. 4, 42)

The capital stock was $45,600.00 divided into shares of $30.00 each, or 1520 shares and the corporation was to exist for the term of 25 years. (R. 41) The company was composed of a large number of individual land owners who conveyed to the company their water rights in exchange for stock entitling them to the use of said water. (R. 5)

There was and is no provision in the Articles of Incorporation of the company relative to the manner of amending the same, and as the statute in force at the time of the organization of the company provided that corporation articles could be amended by vote of at least two-thirds of the outstanding stock, such provisions became effective with respect to the company at that time.

The laws of the Territory of Utah at the time of the organization of the company in 1887 and prior thereto reserved the right to modify, alter and amend the law under which corporations were organized.

In the Compiled Laws of Utah, 1876, which compilation was approved and adopted by the Legislature of the Territory of Utah February 22, 1878, Section 21, Chapter 4, Page 232, it is provided:

> "The Governor and Legislative Assembly may hereafter modify or repeal this act; but if it be repealed or if the franchise of any corporation organized under this act shall be forfeited, the corporation may continue for the purposes specified in Section 9 of the act, to which this is an amendment."

Also, in chapter XLV of the Laws of Utah, 1884, being an act compiling and amending the laws relating to corporations, and specifying various amendments that might be made, it provided:

> "The Articles of Agreement or Incorporation may be otherwise changed or amended; provided, such amendment does not alter the original purpose of the incorporation."

These provisions and others relating to the reservation of the right to amend corporate charters were carried forward into the Revision of 1888, where it was provided in

Volume 2, Chapter 3, relating to irrigation companies, entitled "An Act Compiling the Laws Relating to the Incorporation of Irrigation Companies" on Page 54, it is, among other things provided:

> "Nothing in this act shall be so construed as to interfere with the right of the Legislative Assembly to repeal, alter or amend the same at pleasure."

These and similar provisions with respect to the reservation of the right to alter, amend or repeal the law relative to corporation, have been carried forward into every revision and/or compilation of the laws of the Territory of Utah, and into the laws of the State of Utah, after its admission to the Union in 1896; and making it doubly clear that these rights were reserved, the Constitution of the State of Utah, in Article XII, Section 1, provides:

> "Corporations may be formed under general laws which shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature and all corporations doing business in this state may as to such business be regulated, limited, or restrained by law."

Section 2 of Article XII required the acceptance of the provisions of the Constitution by all existing corporation. The record is silent as to any formal acceptance by the company, but since it continued business, its acceptance must be presumed.

Throughout the years various amendments were made to the Articles of Incorporation.

On January 8, 1910, Article 4 was amended to extend the life of the corporation to fifty years, or until February 26, 1937, (R. 42, 43), and on the 9th day of January, 1937,

Article 4 was amended to extend the life of the corporation one hundred years from and after the 26th day of February, 1887, (R. 44). These are all the amendments with reference to the renewal of the charter and all were made after the Constitution of the State was adopted.

At the time of the incorporation of the company, the general laws of the Territory with respect to the assessments of the fully paid up capital stock provided:

> "Any person who is the holder of fully paid up capital stock, shall not be liable for any assessments or for any indebtedness of the corporation, otherwise than the sale of his or her stock, as herein provided, unless distinctly provided for in the Articles of Incorporation, which Articles of Incorporation shall not be changed in this respect without the consent of all the stockholders in writing."

This remained the law of the Territory and has remained the law of the State up to the present time.

Assessments up to ten per cent were permitted by statute at the time of the organization of the company. Gary, et al, vs. York Mining Company, et al, 9 Utah, 464; 35 Pac. 494.

Other amendments have been made to the Articles of the company; on January 8, 1910, the capital stock was increased $180.00 or six shares;

On November 11, 1922, the capital stock was increased to $90,000.00, divided into three thousand shares with the par value of $30.00 per share, (R. 43), or practically double the original capitalization.

With reference to stock assessments, on June 17, 1914, the Articles were amended by adding Article 3½, limiting the assessment upon the stock to $3.00 per share per year. (R. 43)

All these amendments were duly certified to the Secretary of State and Certificates of Amendment issued in due form.

The above includes all the amendments made to the Articles of Incorporation of the company prior to May 7, 1938.

When the life of the corporation was extended in 1937, the general laws of the State of Utah permitted amendments to be made in the Articles of Incorporation by a majority vote of the outstanding stock. Section 18-2-44, Revised Statutes of Utah, 1933, (this statute will be quoted in full hereafter in the brief).

On May 7, 1938, the outstanding capital stock of the company was 1954 shares, (R. 10), and on that date at a regularly called and held meeting of the company stockholders, 1028.89 shares of stock were voted in favor, and 660.93 were voted against the adoption of a resolution authorizing the Board of Trustees of the company to subscribe for 2000 shares of the capital stock of the Provo River Water Users Association for the purpose of acquiring an adequate supplementary water supply for the irrigation of lands of the company stockholders from the United States Deer Creek Project in Provo Canyon, Utah, (R. 44, 45); that at the same meeting 1029 shares of stock were voted in favor and ½ share was voted against the adoption of a resolution amending Article 2 of the Articles of Incorporation of the company to enlarge the purposes of the corporation, (R. 45, 46), and to amend Article 3½, so that the capital stock should be assessable for any and all corporate purposes. (R. 47)

It is these last amendments to which petitioners object and which they contend impair their contract with the company.

Nothing in this case discloses any reason for this Court to entertain or grant a Writ of Certiorari herein.

POINT A

The Supreme Court of the State of Utah in its decision in this case has determined that there are no violations of either State or Federal Constitutions involved herein. In making this decision no Legislative Act was construed or interpreted. No question concerning the impairment of a contract arises under the Supreme Court decision in this case.

POINT B

If any Federal question is raised in the Petition for a Writ of Certiorari, the same was not timely presented either to the trial court or the Supreme Court of Utah, and in no event is there presented a Federal question.

ARGUMENT

POINT A

The Supreme Court of the State of Utah held that by the amendment to the Articles of Incorporation in 1937 extending the life of the charter to one hundred years, the company in effect sought and obtained a new charter at that time and that hence the Constitution and laws then in force formed a part of the contract between the corporation and the stockholders, (R. 72, 73, citing supporting cases).

Having declared that the laws in force at that time became a part of the charter, the Supreme Court expressly determined that, because the Articles contained no provision for their amendment, the charter at the time of the amendments in 1938, adopted Article XII, Section 1, of the Constitution heretofore set forth in the statement of Case, and the provisions of Section 18-2-44, Revised Statutes of Utah, 1933, which read as follows:

"The articles of incorporation of any corporation

now existing or that hereafter may be organized under the laws of this state may be amended in any respect conformable to the laws of this state in such manner and by the vote of such proportion of all or any class or classes of stock as the articles of incorporation may provide; and in case the articles of incorporation do not so provide, by a vote representing at least a majority in amount of the outstanding stock thereof entitled to vote at a stockholders' meeting called for that purpose as prescribed in section 18-2-45; provided, that, if all the stockholders entitled to vote vote in favor of such amendment at any meeting of the stockholders, the notice required by section 18-2-45 need not be given; and provided further, that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the outstanding stock, but the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation; provided further, that no amendments shall be made which shall have the effect of reducing or authorizing the reduction of the capital, subscribed or paid in, of the corporation to an amount less than fifty per cent in excess of the indebtedness of the corporation; and provided further, that the personal or individual liability of the holder of full-paid stock for assessments or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders."

Hence the amendments adopted in 1938, required only a majority vote which they secured, and no impairment of any contract occurred.

No violation of Article I, Section 18 of the Constitution of Utah or of Article I, Section 10 of the Constitution of the United States, nor is any legislation subsequent to

1937, involved in this case, (R. 78).

The Supreme Court merely declared the law of this state upon a local question—that when a corporation seeks and obtains an extension of the life of its charter, under the law, it in effect obtains a new charter.

The petitioners and plaintiffs contended in the Supreme Court that the amendment of 1938 to Article 2 altered the purpose of the original corporation in violation of the statute. The statute, however, 18-2-44, supra, written into the new charter, provided, "The adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation."

In its decision herein the Supreme Court determined that the amendments of 1938 to Article 2 did not alter the original purpose but were a valid adding to or extension thereof. This decision was merely a declaration of local law, (R. 74, 75).

No Constitutional question was here involved. The amendment in 1938 to Article 3½ gives the power to levy assessments for any and all corporate purposes. This was likewise passed by a majority of the outstanding stock.

Section 18-2-44, Revised Statutes of Utah, 1933, supra, further provides:

> " - - - - that the personal or individual liability of the holder of full-paid stock for assessments or for the indebtedness or obligations of a corporation shall not be changed without the consent of all the stockholders."

In Weede v. Emma Cooper Company, 58 Utah, 524; 200 Pac. 517, the Utah Supreme Court held that stock could be made assessable by a majority vote and that the personal and individual liability specified in the statute is such a liability as may be enforced by a personal judgment

and does not prevent amendments to the Articles of Incorporation to provide for assessments against the stock owned by the stockholder.

This provision and its interpretation were likewise written into the new charter of 1937. Hence, there was no impairment of any contracts by any of these amendments of 1938, and no legislation enacted subsequent to the charter is involved.

The only specific Constitutional violation charged by the plaintiffs in the trial court are found in paragraph XXIV of their complaint, (R. 15), and paragraph 1 of their reply, (R. 29), which charged impairment of contractual obligations. Under the decision of the State Supreme Court no contractual obligations were violated. No Federal question is involved.

This Court will not review the question of whether or not the Supreme Court of Utah has misconstrued a State statute. King v. West Virginia, 216 U. S. 92; 30 Sup. Ct. 225; 54 L. Ed. 396.

If merely construction of a State statute is involved, the writ of error will not lie. Dower, et al, v. Richards, et al, 151 U. S. 658; 38 L. Ed. 305; 14 Sup. Ct. 452; Union Pacific R. Co. v. Callaghan, 161 U. S. 91; 40 L. Ed. 628; 16 Sup. Ct. 493; Egan v. Hart, et al, 165 U. S. 188; 41 L. Ed. 680; 17 Sup. Ct. 300.

The record must show affirmatively that a Federal question is involved. Mere assertion not sufficient. Fowler v. Lamson, 164 U. S. 252; 41 L. Ed. 424; 17 Sup. Ct. 112.

A decision on question of compliance with a State Constitution or statute does not involve a Federal question. Powell v. Supervisors of Brunswick County, 150 U. S. 433; 14 Sup. Ct. 166; 37 L. Ed. 1134.

The scope and effect of a state judgment is peculiarly a question of state law and therefore a decision relating to

such subject involves no Federal question. Kenney v. Craven, 215 U. S. 125; 30 Sup. Ct. 64; 54 L. Ed. 122.

Petitioners and plaintiffs apparently concede under Point 3, page 55, of their brief herein that there is no violation of the provisions of Article I, Section 10 of the Constitution of the United States, since there is no legislative impairment of a contract involved in this case. However, the following is in point:

> "This clause, (of the United States Constitution) as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question." Cross Lake Shooting and Fishing Club v. Louisiana, 224 U. S. 632, 738 40; 56 L Ed. 924, 928; 32 Sup. Ct. 577.

POINT B

In this court the petitioners and plaintiffs assert that the amendments in question of 1938 deprive them of due process of law, the equal protection of law, and are discriminatory in violation of the Fourteenth Amendment to the United States Constitution. These contentions were never presented to the trial court and were presented to the Utah Supreme Court for the first time in the petition for rehearing. It is too late to raise a Federal question for the first time in a petition for rehearing. Consolidated Turnpike Company v. Norfolk & Ocean View R. Co., 228 U. S. 326; 33 Sup. Ct. 510; 57 L. Ed. 857; Rehearing denied 228 U. S. 596; 33 Sup. Ct. 665; 57 L. Ed. 709.

A party who has raised only one Federal question in the State court cannot "come into this court from a state court and argue the question thus raised, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised." Dewey v. Des Moines, 173 U. S. 193; 19 Sup. Ct. 379; 43 L. Ed. 665.

Assignments of error in this court cannot cure the failure of the record in the State court to show the Federal question was there raised and decided. Appleby v. City of Buffalo, 221 U. S. 524; 55 L. Ed. 838; 31 Sup. Ct. 699.

The right, title, privilege or immunity claimed under the Constitution of the United States must be specifically set up or claimed in the court below at the proper time and in the proper way to give this court jurisdiction. People of State of New York ex rel. Rosevale Realty Co. v. Kluner, 268 U. S. 646; 68 L. Ed. 1135; 45 Sup. Ct. 618; Mutual Life Ins. Co. v. Wm. Grew, 188 U. S. 291; 23 Sup. Ct. 375; 47 L. Ed. 480.

Even though petitioners and plaintiffs had raised the question under the Fourteenth Amendment at the proper time, there is no merit in their claims.

The Utah Supreme Court in this case held that the extension of the charter's life in 1937 read into the charter the provisions of Section 100-1-13, Revised Statutes of Utah, 1933 (Laws of Utah 1897) which read as follows:

> "Any irrigation or reservoir company incorporated and existing under the laws of this state may purchase or subscribe for the capital stock of any other similar corporation which at the time of such purchase or subscription shall be or is about to be incorporated; provided, that such purchase or subscription shall be made only when permit-

ted by the articles of incorporation, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription."

Under this section the Articles were amended in 1938 to authorize the purchase of stock in similar corporations.

The petitioners and plaintiffs contend now for the first time, that the Supreme Court should likewise have read into the charter the provisions for the next section, 100-1-14, reading as follows:

> "All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the persons claiming the right to use the water, so long as the water is used beneficially thereon; provided, that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right may, on application to the state engineer, be severed from said land, and simultaneously transferred to and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights; and in case of such change, the owner of such water right shall execute and acknowledge a proper instrument of transfer describing therein the land from and to which such water is transferred, which instrument shall be recorded in the county recorder's office of the counties in which the lands are situated."

And as we understand their contention, it is that this water is not appurtenant to the land because the stockholders own the land and the company owns the water right, and that having no use for the water, these petitioners will be

compelled to pay for the water used by other stockholders.

The Supreme Court of Utah in its decision herein expressly held that the individual needs of the stockholders are immaterial, that the will of the corporation is controlling, and that in this case the will was established by a majority vote of the stock. (R. 77) No Federal question is involved here.

However, in re Johnson's Estate, 64 Utah 114; 228 P. 748, (1924) the Utah Supreme Court held that water represented by shares in a mutual irrigation company is appurtenant to land held by the stockholders, and that has always been the law in Utah.

This statute was never involved in this case. Where the 2000 shares to be purchased are to be used is a matter for future determination. The company, however, is buying for the use of its stockholders. If these objecting stockholders do not want this water or cannot use it upon the lands they own, there is no obligation upon them to retain it.

> "If it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose." Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 161-163; 41 L. Ed. 369, 389-90; 17 Sup. Ct. 56.

No question of due process is involved, since the petitioners and plaintiffs had full notice and hearing. Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 270; 56 L. Ed. 760; 32 Sup. Ct. 406.

> "The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the re-

quirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law."

There being no proper Federal question here involved, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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